

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY A. BAILEY)	
Claimant)	
)	
VS.)	Docket Nos. 248,868 &
)	248,869
HALLMARK CARDS, INC.)	
Self-Insured Respondent)	

ORDER

Respondent requested review of the July 1, 2004 Post Award Medical decision entered by Administrative Law Judge Brad E. Avery. This is a post-award proceeding for medical benefits. Both parties submitted briefs and the case was placed on the summary docket on August 17, 2004, for a decision without oral argument.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The record considered by the Board consists of the Post-Award Hearing transcript dated March 12, 2004; the deposition of Tracey Bailey taken on April 8, 2004; the deposition of Darrin Cox, P.A., taken on April 14, 2004; the deposition of Chris Fevurly, M.D., taken on June 9, 2004; the exhibits offered into evidence by the parties and pleadings and correspondence contained in the administrative file.

ISSUES

The Administrative Law Judge (ALJ) found the claimant was entitled to continuing medical treatment for his upper extremities with Dr. Laurie Conway or her physician's assistant. The ALJ also ordered respondent to pay certain medical bills and to pay claimant mileage reimbursement for trips to the doctor as well as to the pharmacy.

The respondent requests review of the following: (1) whether the ALJ had authority to award medical benefits for dates preceding the final Award on November 12, 2003; (2) whether the ALJ had authority to award medical benefits as authorized medical when those same benefits were deemed unauthorized in the November 12, 2003 Award; (3) whether the ALJ had authority to grant medical benefits which were denied by the May 28, 2004 Board Order; (4) whether the medical care is necessary to cure and relieve the effects of the injury; and, (5) whether the claimant is entitled to medical mileage for picking up prescription medications when personal errands were performed on the some of the trips. Respondent argues the claimant has failed to sustain his burden of proof and the application for post-award medical should be denied.

Claimant raises the following issues: (1) whether prescription medication is considered medical treatment; (2) whether mileage more than five miles to obtain prescription medications is considered an expense required to be reimbursed; (3) whether the respondent is absolved from providing transportation if on the same trip an incidental purchase has been made; and, (4) whether the ALJ had jurisdiction per K.S.A. 44-510k to award medical benefits retroactive to six months before the filing of the application for post-award medical. Claimant argues the ALJ's Post Award Medical decision should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ entered an award in these consolidated cases on November 12, 2003. Claimant requested Board review of that decision. While the request for Board review was pending the claimant filed an application for post-award medical treatment on January 15, 2004. A hearing on the application for post-award medical was held on March 12, 2004. On May 28, 2004, the Board issued its Order regarding the review of the final award. On July 1, 2004 the ALJ issued the Post Award Medical decision.

In the November 12, 2003 Award the ALJ ordered certain medications prescribed by claimant's personal physician to be paid under the unauthorized provisions of the Act. Some of these same medications are still being prescribed by claimant's personal physician and are the subject of claimant's post-award application for future medical treatment. The ALJ had also ordered future medical treatment upon proper application to the director.

On review before the Board of the ALJ's November 12, 2003 Award, the claimant requested payment for medications prescribed by his personal physician. In its Order dated May 28, 2004, the Board stated:

Claimant is requesting additional medical care on the basis that he is receiving prescription medications from his personal physician. Accordingly, claimant desires reimbursement for the medications he has previously purchased, reimbursement for the miles driven to pick up those medicines and the payment of future prescription expense and mileage. Claimant testified his personal doctor is providing him prescriptions for a pain killer, muscle relaxer and a sleep aid.

Claimant argues the prescriptions are reasonable and medically necessary as a doctor is writing the prescriptions. The record contains very little evidence regarding this issue. However, Dr. Delgado testified claimant did not need any prescription medications as he should take mild over-the-counter analgesics. And in Dr. Prostic's February 3, 2003 medical report to claimant's attorney, the doctor indicated no additional treatment was recommended at that time.

The Board finds claimant has failed to prove that his prescription medications are reasonable and necessary. Accordingly, the Board denies claimant's requests for reimbursement and for ongoing prescription medications as authorized medical care.¹

Before the Board issued its Order the claimant had filed his Application for Post-Award Medical on January 15, 2004. At the post-award hearing, the claimant requested that Dr. Laurie Conway be authorized as the treating physician in order to provide prescription medication. Claimant further requested payment of medical bills as well as mileage for trips to pick up prescriptions and to the doctor. Respondent denied there was need for further treatment nor prescription medication.

Claimant complained of ongoing burning sensation in both shoulders as well as pain in his shoulder and elbow. Claimant noted he currently is taking the generic equivalencies of Ultram, Darvocet and Flexeril. The medication was prescribed by Darrin Cox, Dr. Conway's physician's assistant. Claimant testified he has constant pain but the medications dulls the pain. Claimant noted he can get along without the medications but then has increased pain with activity. Claimant further noted it had been about a year and a half since he had attempted to not use medications.

Claimant has never been examined or evaluated by Dr. Conway and instead sees the physician's assistant, Darrin Cox. And claimant only sees the physician's assistant every few months. During those visits claimant is usually just asked how he feels and a physical examination is not performed.

Claimant attributes his current condition and symptoms to his work-related injury while employed by respondent. Claimant denied suffering any new injuries but admitted

¹ *Bailey v. Hallmark Cards, Inc.*, No. 248,868 & 248,869, 2004 WL 1301701 (Kan. WCAB May 28, 2004).

that his current work activities, especially installing cable in ceilings aggravates the pain for which he takes medications. Claimant further noted in his current job he drives a lot which causes a burning sensation in his shoulders.

Claimant's first visit with Darrin Cox, P.A., was on May 13, 2002. Claimant was complaining of shoulder and neck pain. Mr. Cox noted claimant had been treating with a specialist and sought follow-up care. Ultimately, claimant was prescribed Ultram, Darvocet and Flexeril. The physician's assistant prescribed as low a dose of the medications as possible because it was for long term treatment for claimant's chronic bilateral shoulder pain.

The physician's assistant prescribed Darvocet, a mild narcotic pain medicine, for breakthrough pain. Although the physician's assistant only prescribed the Darvocet for breakthrough pain, claimant testified he takes that medication daily. The physician's assistant further testified he expected claimant to continue to take the medications for the long term. The physician's assistant agreed that when a patient is on medications for an extended period of time he counsels the patient to attempt to discontinue use of the medications. But the physician's assistant further agreed that he had not, as yet, had such a counseling session with the claimant.

At respondent's request, claimant was examined by Dr. Chris D. Fevurly on March 25, 2004. Dr. Fevurly opined claimant does not require prescription medication as a result of his work-related injuries. Dr. Fevurly testified:

Q. Okay. Doctor, taking a look at your review of medical records and your own examination of Mr. Bailey, do you have an opinion within a reasonable degree of medical certainty as to whether Mr. Bailey requires any medication at this time which is reasonable and necessary to cure and relieve the effects of the injuries suffered while working at Hallmark?

A. I think the injuries that he may have suffered four years ago have resolved. If he has complaints of pain I think the safest thing for him to do and an effective thing to do is to use over-the-counter Acetaminophen or Tylenol and whatever over-the-counter antiinflammatory [sic] drug he wants to use. I would encourage him to try not to use medications chronically because the harm from these medicines long term are likely going to outweigh any presumed benefit. But if he feels that he wants something for pain that would be the way to go.

Q. Do you have an opinion, Doctor, within a reasonable degree of medical certainty as to whether he requires medical care of any kind at this time to cure and relieve the effects of injuries suffered while working at Hallmark?

A. No. I think he's reached maximum medical improvement from his injuries and there's no reasonable indication to expect to benefit from further consultations, therapeutic interventions, or diagnostic testing. I think he's done.²

Dr. Fevurly further noted the risks of long-term prescription medication usage often outweighs the benefits. The doctor noted there are addiction problems associated with habitual usage of drugs such as Darvocet. And the doctor noted with long-term drug usage the claimant potentially could develop renal or hepatic and bone marrow problems. Finally Dr. Fevurly concluded the medications claimant was taking are directed to pathoanatomical injuries that are no longer present.

The claimant requests authorization for the unauthorized treatment he began receiving before the original award in this claim. The same physician's assistant is prescribing essentially the same medications for the same complaints. As previously noted, at the time of the Board's review of the November 12, 2003 Award, it was determined claimant had failed to prove that his prescription medications were reasonable and necessary. The Board noted that Dr. Prostic concluded claimant needed no further treatment and Dr. Delgado specifically indicated claimant did not need prescription medications. Nothing has changed. The physician's assistant continues to prescribe the same medications for the same complaints and indicates that such medication will be required long term. In contrast, Dr. Fevurly examined claimant and determined there is no need for such prescription medication.

The Board finds the opinion expressed by Dr. Fevurly, which corroborates Drs. Delgado and Prostic's earlier opinions, more persuasive and finds claimant has failed to meet his burden of proof to establish the need for additional medical treatment or prescription medication.

Consequently, the Board reverses the ALJ's Post Award Medical decision and denies claimant's requested reimbursement and authorized medical treatment with Dr. Conway or her physician's assistant.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 1, 2004, is reversed and claimant's request for benefits is denied.

IT IS SO ORDERED.

² Fevurly Depo. at 16-17.

Dated this 31st day of August 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director